



February 17, 2017

*Submitted Electronically, Please Confirm Receipt*

Regional Freedom of Information Officer  
U.S. EPA, Region 2  
290 Broadway, 26th Floor  
New York, NY 10007-1866  
(212) 637-3668

**Re: Freedom of Information Act Request for records regarding Energy Answers’  
April 2014 PSD permit.**

Dear Regional FOI Officer:

On behalf of Amigos del Río Guaynabo, Inc., Ciudadanos en Defensa del Ambiente, Comité Basura Cero Arecibo, Madres de Negro de Arecibo, and Sierra Club de Puerto Rico (collectively “Public Interest Groups”), the Environmental and Natural Resources Law Clinic submits this request for information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Environmental Protection Agency (EPA) FOIA regulations set forth in 40 C.F.R. Part 2. This request seeks information regarding Energy Answers’ April 10, 2014 Prevention of Significant Deterioration (PSD) permit for the proposed waste-to-energy generator in Arecibo, Puerto Rico (“April 2014 PSD permit”). The focus of this request is on records relating to the 2014 PSD permit since EPA granted an extension on October 1, 2015.

The Public Interest Groups request a fee waiver for this FOIA request.

### **Background**

Energy Answers is proposing to construct a waste-to-energy facility in Arecibo, Puerto Rico. EPA Region 2 issued a PSD permit for the facility on April 10, 2014. Pursuant to EPA regulations, the 2014 PSD permit was set to expire within 18-months of its issuance if Energy Answers failed to commence construction of the facility. 40 C.F.R. § 52.21(r)(2). Because Energy Answers did not commence construction within that time, it sought and later received an 18-month extension from EPA Region 2 on October 1, 2015. *See* Appendix A. The 2014 Permit is set to expire on April 10, 2017 unless Energy Answers commences construction or receives a second extension.

EPA has previously stated that “in the event that Energy Answers does not commence construction by April 10, 2017, Region 2 is not inclined to grant another extension.” *Id.* Pursuant to EPA’s Guidance on Extension of Prevention of Significant Deterioration (PSD) Permits under 40 CFR §52.21(r)(2) (Extension Memorandum), EPA explained that “it is significantly more likely that technology and air quality considerations will become outdated when construction does not begin until 36 months or longer” after the final PSD permit is issued.

### **Request**

For purposes of this request, the term “records” means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

Specifically, the Public Interest Groups seek:

1. All records pertaining to the April 2014 PSD permit. *See* Appendix A. These records include, but are not limited to, communications involving Energy Answers or The Horinko Group.

This request seeks all such records from October 1, 2015 until the date EPA acknowledges this request.

### **Record Delivery**

To save resources and mailing expense, we request electronic copies of these documents, if available. If EPA chooses not to disclose any of the requested records, we request that the agency: 1) Identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); 2) Explain in full the basis on which nondisclosure is sought; and 3) Provide us with any segregable portions of the records for which it does not claim a specific exemption.

We anticipate a reply within twenty working days. 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a). We appreciate your expeditious help in obtaining the requested information. Failure to comply within the statutory timeframe may result in the ENRLC taking additional steps to ensure timely receipt of the requested materials. Please promptly mail or email copies of all requested records to:

Ken Rumelt, Senior Attorney  
Environmental and Natural Resources Law Clinic  
Vermont Law School  
PO Box 96, 164 Chelsea Street  
South Royalton, VT 05068  
Email: [krumelt@vermontlaw.edu](mailto:krumelt@vermontlaw.edu)

If you find that this request is unclear or if the responsive records are voluminous please contact me at (802) 831-1031 to discuss the proper scope of this request.

### **Fee Waiver Request**

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). Notably, the Public Interest Groups are non-profit, tax exempt public interest organization engaged in educating the public and local residents about environmental issues. The information provided in response to this request will be used to contribute to the public understanding of the protection of air quality in Arecibo, Puerto Rico. This is an issue of public interest and will not be used for any commercial purposes, business, trade, or profit. The Public Interest Groups possess the ability and intent to disseminate the requested information to the general public.

#### **I. A FEE WAIVER IS APPROPRIATE**

Fee waivers are appropriate when “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l). EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. Additionally, to determine whether the request “is not primarily in the commercial interest of the requester” the government will consider two factors: 1) The existence and magnitude of a commercial interest and 2) the primary interest in disclosure.

#### **A. The Request is in the Public Interest.**

##### **1. The request seeks information that has a “direct and clear” connection to EPA operations or activities.**

The Public Interest Groups’ request meets all four factors under the first requirement. First, the subject of the request “concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.” 40 C.F.R. § 2.107(l)(2)(i). This request

seeks information directly related to the EPA’s decision whether to grant an extension regarding Energy Answer’s 2014 PSD permit. The connection is “direct and clear” because EPA possesses the statutory authority to regulate PSD permits pursuant to 42 U.S.C. §7475. EPA regulations also state that a PSD permit will terminate if the permittee does not commence construction within 18 months of receiving the permit, although EPA may extend the 18-month period upon a proper showing. 40 C.F.R. § 52.21(r)(2). EPA has also stated that it would not be “inclined to grant another extension” here because ‘it is significantly more likely that technology and air quality considerations will become outdated when construction does not begin until 36 months or longer’ after the final PSD permit is issued. *See* Appendix A at 2.

**2. Disclosure of the requested information is “likely to contribute” to an “understanding of government operations or activities.”**

EPA next considers whether disclosure of the requested is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the disclosable records must be “meaningfully informative about government operations or activities. *Id.* Information not “already . . . in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.* Here, the Public Interest Groups request information that will provide both the Public Interest Groups and the general public with a better understanding of how EPA determines whether to grant a second PSD permit extension in the face of a permittees failure to commence construction. The requested information will likely reveal what information EPA requests from the permittee, what information EPA considers vis-à-vis changes in technology, and what information permittees and EPA may believe justify a second extension. This information is particularly helpful to the public’s understanding because EPA has already stated that, if Energy Answers does not commence construction “by April 10, 2017, [EPA] is not inclined to grant another extension.” Appendix A. The disclosed records will inform the public what factors the EPA considers persuasive when the agency is inclined to deny the extension.

**3. The requested information will contribute to the public’s understanding of PSD permit extensions.**

EPA also considers whether the requested information will contribute to “public understanding” of the subject. 40 C.F.R. § 2.107(l)(2)(iii). Disclosure “must contribute to the understanding of a reasonably broad audience.” *Id.* EPA will consider whether requestor has “expertise in the subject are and [an] ability and intention to effectively convey information to the public.” *Id.* Here, there is widespread interest in the future of the Energy Answers facility. For example, more than 3,800 people submitted comments on draft environmental impact statement for the facility issued by the Rural Utilities Service, U.S. Department of Agriculture.<sup>1</sup> Most, if not all,

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<sup>1</sup> U.S. Department of Agriculture, Rural Utilities Service, Final Environmental Impact Statement, Arecibo Waste-to-Energy and Resource Recovery Project C-1 (Jan. 2017), [https://www.rd.usda.gov/files/UWP-Arecibo\\_WTE\\_FEIS.pdf](https://www.rd.usda.gov/files/UWP-Arecibo_WTE_FEIS.pdf).

of these individuals and groups will be interested in learning about a potential extension of the 2014 PSD permit. The Public Interest Groups intend to disseminate information obtained through this FOIA request broadly through means such as newsletters, websites, social media, and press releases. Further, the Public Interest Groups have developed significant expertise in environmental and public health advocacy that range from litigating the legality of the 2014 PSD permit and submitting extensive comments on the draft environmental impact statement referenced above.

**4. Disclosure of the requested information will make a significant contribution to the public's understanding of the Arecibo PSD permit and EPA's decision on a second extension.**

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *See also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public's understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public's understanding,” the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

Here, the request satisfies the fourth factor because disclosed records are not currently available to the general public. The information will also have a significant impact because the EPA has already stated that it was not inclined to extend Energy Answer's PSD permit a second time as relevant information on technology and air pollution concerns are more likely to become stale after three years. *See* Appendix A. The disclosed records will inform the public what the EPA considers under the higher threshold.

**B. A Fee Waiver Is Also Proper Because the Public Interest Groups Have No Commercial Interest in Disclosure of the Requested Information.**

The request is not in the commercial interest of the requester. To satisfy this prong, the EPA will consider two factors. First, the EPA will consider the “existence and magnitude of a commercial interest” and second, the EPA will consider “the primary interest in disclosure.” 40 C.F.R. § 2.107(l)(3). Here, the Public Interest Groups are non-profits or local grassroots organizations, dedicated to the protection and enjoyment of the environment. Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, and Comité Basura Cero Arecibo are all 501(c)(3) non-profits. The organizations exist solely to advocate for the protection and enjoyment of the environment and do not seek commercial benefit.

Given the non-profit nature of the Public Interest Groups, their limited financial resources, and all of the foregoing reasons, a fee waiver is warranted. 5 U.S.C. § 552(a)(4)(A)(iii).

For the foregoing reasons, we urge EPA to waive all fees associated with this request. In the event that you do not grant the requested waiver, however, please provide us with specific information concerning the basis for such a decision, as required by the FOIA.

Please note that our request for a fee waiver should not be construed as an extension of time in which to reply to this FOIA request. Please send information on a rolling basis as it becomes available. In the event that the FOIA officer denies a fee waiver, please contact us at (802) 831-1031 to discuss fees.

### **Conclusion**

If you have any questions, please do not hesitate to contact us. Thank you in advance for your prompt reply.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ken Rumelt", is positioned above a horizontal line.

Ken Rumelt  
Professor of Law and Senior Attorney

# **Appendix A**



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

**OCT - 1 2015**

Mr. Patrick Mahoney  
President  
Energy Answers, LLC  
79 North Pearl Street  
Albany, New York 12207

Re: Prevention of Significant Deterioration (PSD) of Air Quality  
Request for a PSD Permit Extension for the Energy Answers Arecibo Puerto Rico  
Renewable Energy Project

Dear Mr. Mahoney:

EPA is in receipt of your letters dated July 26, 2015 and August 14, 2015 requesting an extension of the final PSD permit for the proposed Energy Answers Arecibo, LLC (Energy Answers) facility. We have reviewed the information you provided, considered nationally issued guidance on PSD permit extensions, and determined that an extension of 18 months is warranted in this case.

**Background**

On April 10, 2014, EPA Region 2 issued a final and effective PSD permit decision for construction of the Energy Answers Arecibo Puerto Rico Renewable Energy Project. EPA regulations at 40 CFR 52.21 (r) (2) provide that the permit will become invalid if construction is not commenced within 18 months of your receipt of the final permit decision. Given the April 10, 2014 permit issuance date, and your receipt of the permit on that date, the 18-month period will end on October 10, 2015. However, 40 CFR 52.21 (r) (2) also provides that EPA may extend the 18-month period for commencement of construction upon a satisfactory showing that an extension is justified.

Following issuance of the final PSD permit decision for Energy Answers, Sierra Club de Puerto Rico, et al., filed a petition for judicial review on July 16, 2014 in the D.C. Circuit Court. While no specific condition of the PSD permit was challenged, the petitioners argue that when EPA granted the PSD permit, it erroneously concluded that nonattainment New Source Review did not apply. The case has already been fully briefed but the Court has not yet scheduled oral argument.

**Discussion**

EPA's interpretation of the permit extension provision of 40 CFR 52.21(r) (2) is discussed in EPA's Memorandum dated January 31, 2014, titled "Guidance on Extension of Prevention of



Significant Deterioration (PSD) Permits under 40 CFR 52.21(r) (2)” (Extension Memorandum). This Memorandum clarifies what EPA considers adequate justification for such an extension and indicates that a request for extension should be evaluated on a case-by-case basis. However, for first-time PSD permit extension requests, the Memorandum specifically cites ongoing litigation and “inability to secure financial resources necessary to commence construction,” as relevant factors in determining whether adequate justification has been provided. The memorandum also references “significant or unusual economic impediments (including inability to secure financial resources necessary to commence construction)” as relevant factors that may justify a first-time extension.

Your August 14, 2015 letter indicates that the ongoing litigation “precludes the completion of financing and release of construction funds for the Project” and “precludes the execution of the design-build construction contract.” We are mindful of the fact that the D.C. Circuit case might not be decided until as late as next summer and recognize, as your August 14, 2015 letter notes, the time necessary to complete the financing after a decision. Your August 14, 2015 letter also references, among other factors, the impact of Puerto Rico’s economic situation on the project which has required your company to adopt new strategies for financial viability including a request for the use of a federally-backed loan program from the United States Department of Agriculture Rural Utilities Service that requires an Environmental Impact Statement. These details, along with others in your letter, provide adequate justification under the Extension Memorandum for a permit extension without any revisions or reconsideration of the substantive conditions of the permit. Therefore, EPA is extending the Energy Answers PSD permit for an additional 18-month period, until April 10, 2017.

The Memorandum encourages the permitting authority to notify the public once it has issued the permit extension, particularly where there has been significant public interest in the permit. Given the large number of commenters on the Energy Answers PSD permit, Region 2 will be posting this decision to extend the Energy Answers PSD permit on its website and placing notice of this decision in a local newspaper.

In conclusion, EPA has determined that Energy Answers has provided adequate justification for its request for an 18-month extension, consistent with what EPA has described as an adequate justification in the Extension Memorandum. Therefore, EPA extends the effective date of the Energy Answers’ PSD permit until April 10, 2017. Please note that this action does not alter the substantive PSD permit conditions found in Enclosure I and the Enclosure II-General Permit Conditions which were included with the April 10, 2014 PSD permit. Also note that in the event that Energy Answers does not commence construction by April 10, 2017, Region 2 is not inclined to grant another extension. As observed by EPA in the Extension Memorandum, “it is significantly more likely that technology and air quality considerations will become outdated when construction does not begin until 36 months or longer” after the final PSD permit is issued.

If you have any questions regarding this letter, please call me at (212) 637-3736 or Steven Riva, Chief, Permitting Section, Air Programs Branch, at (212) 637-4074.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Filippelli".

John Filippelli, Director  
Clean Air and Sustainability Division

cc: Luis Sierra, Puerto Rico Environmental Quality Board  
Jose Font, EPA Region 2, Caribbean Environmental Protection Division